Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

HENRY NICKELL,

Petitioner,

v.

MEMPHIS LIGHT, GAS & WATER DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether it is reversible error for the court to apply the indirect analysis (McDonnell Douglas/Burdine) where there is proffered proof of direct evidence, in determining whether summary judgment should be granted to the defendant in a Title VII case.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Henry B. Nickell, an individual citizen of the United States, residing in the Western District of Tennessee. Henry B. Nickell was the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Memphis Light, Gas & Water Division is a division of the City of Memphis, Tennessee. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of said entity. Memphis Light, Gas & Water Division was the Defendant in the District Court, and the Appellee before the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorai to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at 1a) is unreported. The District Court opinion (App. B at 6a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 30, 2001. (App. A at 1a). The Court of Appeals entered an order denying a timely petition for rehearing en banc on September 10, 2001. (App. C at 19a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment.

STATEMENT OF THE CASE

This is an action based upon Title VII, in which Henry Nickell alleges that he was discriminated against on account of his race (white); the claim is thus a reverse discrimination claim.

Memphis Light, Gas & Water Division (MLGW) is a public utility serving Memphis, Tennessee. MLGW has a President, under whom serve Vice Presidents. They are each responsible for their respective sub-departments. This case involves the division known as Operations, which has several departments, namely: Electric Operations, Gas Operations, Water Operations, Systems Operations, Water Laboratory and, Supply Planning and Utilization Engineering. The person in charge of a sub-department is known as a Manager. Prior to the departure of Mr. Sanford Novick as Vice President of Operations, Mr. Nickell (Appellant) was the Manager of Supply Planning and Utilization Engineering, and Mr. Weaver was the Manager of Electric Operations.

Henry Nickell (white) was hired by MLGW on November 27, 1979. Nickell received a Master of Science in Physics from Memphis State University in 1975. On December 4, 1996, MLGW established a formal policy that guaranteed that Nickell and Garland and certain other employees, would not be excluded from consideration for bid positions solely due to requirement of an engineering degree. This list did not include Mr. Weaver. Mr. Morris, Mr. Magness and Mr. Dillihunt, among other administrators at MLGW, were aware of this policy. In August 1984, Mr. Nickell was promoted to the position of Supervisor of Energy Engineering, Energy Management Department.

In September 1994, Mr. Nickell was promoted to the position of Manager of Supply Planning and Utilization under the supervision of Mr. Novick. Supply Planning and Utilization is a highly technical area that calls for knowledge of not only the gas area, but also the electrical end of the company. Mr. Novick retired in March, 1997.

Mr. Herman Morris (black) shortly after his appointment as Acting President of MLGW met separately with each of the managers of Operations, i.e., Weaver for Electric Operations; Mr. Nickell for Supply Planning & Engineering; and the other managers of Operations. He asked each of them about their current issues in order to get a sense of the organization and operation of their respective areas. Morris thereafter appointed Alonzo Weaver (black) to serve as interim Vice President of Operations. He made the announcement to appoint Mr. Weaver at a meeting with all of the managers of Operations on April 1, 1997. At that time, Mr. Weaver had no advanced degree.

In October, 1997, a Special Notice was posted that bid internally for candidates for the position of Vice President of Operations. This Special Notice read as follows:

> MLGW is seeking a Vice President to manage the Operations Division so that the electric, gas and water utility systems are operated and controlled in an efficient, cost effective manner in accordance with the specifications of the Board of Commissions and external governmental regulatory agencies.
>
> A degree in Engineering or Physical Sciences and management experience in

> Operations, Engineering or Construction or an equivalent combination of education and experience are required. MBA or other advanced degree preferred.
>
> Qualified persons interested in applying for this vacancy should submit a resume and any other pertinent information to: Mike Magness, Manager, Personnel Department, AB/01 Room 101, by 5:00 p.m., October 31, 1997. (emphasis added).

There were seven applications submitted, including Nickell's application.

The selector, in consultation with Mr. Morris, selected only three candidates for interview. Only four of the seven applicants met the educational requirement of an "MBA or other advanced degree." Although Mr. Nickell met the advanced degree requirement and met all of the other requirements, he was not provided an opportunity to interview. Nickell had far more relevant experience than the individual selected, Weaver (black) or the other two candidates. Nickell met with Morris prior to his decision not to interview more than three candidates and discussed with Morris the fact that Weaver was delegating many of the important duties of Vice President operations to Nickell, that Weaver was requiring Nickell to produce responses to requests from Morris and rewriting responses prepared by Nickell on his letterhead with his name and otherwise plagiarizing the work of Nickell and taking credit for Nickell's work that Weaver was unable to perform. The selector admitted that she took race into consideration in the selection process, although she admitted this was not legal. Curtis Dillihunt, Vice President for Human Resources of

MLGW, admitted in his deposition testimony that at MLGW the race of a person is considered in determining whether a candidate should be for a position, but that it should not be so. Mr. Dillihunt (black/male) also admitted that he became the Vice President of Human Resources because the President, i.e., Mr. Morris, asked him to take the position (clearly the job was not advertised, or posted, or noticed). Mr. Dillihunt admitted that he did not apply for the position of Vice President of Human Resources and that no notice was posted for the position. Mr. Cole (black/male) was given the position of Vice President of Public Affairs by virtue of eliminating a position for which Mr. McCullough (white/male) was qualified. These are yet further examples of the pre-selection practice of Herman Morris and MLGW to place blacks in executive positions and further evidence of planned calculating reverse discrimination practiced by Mr. Morris and MLGW.

REASONS FOR GRANTING THE WRIT

I.

MCDONNELL DOUGLAS/BURDINE ANALYSIS SHOULD NOT BE FOLLOWED WHERE THERE IS DIRECT EVIDENCE OF DISCRIMINATION

Both the district court and the court of appeals analyzed the case based upon the McDonnell Douglas/Burdine analysis, even though Henry Nickell proffered direct evidence of discrimination on account of race. Petitioner contends that use of the three-step burden-shifting analysis is error, where there is such direct evidence. This is abundantly clear, because otherwise the court requires evidence sufficient to raise an inference of discrimination. The issue is thus why

any plaintiff should be required to base his discrimination claim upon circumstantial proof, and the indirect method, where and when he has direct evidence.

The question is given great importance because summary judgment is a device used by defense attorneys to prevent cases from going to trial. While bona fide, the use of Rule 56 motions has been greatly expanded under the decisions of Matsushita Elec. Indus.Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and their progeny. However, where there is direct evidence of discrimination, it would appear that summary relief would be inappropriate customarily.

In the instant case, Henry Nickell, a white male, applied for the position of vice president of Operations. The successful candidate was a black, or African-American male. The selector in charge of the selection process for the vice president of Operations position admitted in her deposition that she took race into consideration in the selection process, even though she knew this was not legal. Likewise, her supervisor, Curtis Dillihunt, admitted that at MLGW the race of a person is considered in determining whether a candidate should be considered, but that it should not be so.

Henry Nickell elicited from various witnesses testimony, which proved that there was evidence of a pre-selection practice at MLGW, which favored African-Americans over white employees. Nickell further proffered in opposition to the motion for summary judgment names of persons placed into positions on account of their race, and showed that MLGW has a reason or inclination to discriminate invidiously against white employees.

Using the analysis appropriate for direct evidence, summary judgment would not be appropriate. There exists a material issue of fact, precluding summary relief. This is an important issue for the Supreme Court to decide, especially given the large percentage of cases which result in summary judgment in favor of defendants.

II.

USE OF MCDONNELL DOUGLAS/BURDINE ANALYSIS CIRCUMVENTS THE PURPOSE OF TITLE VII

Title VII was designed to prohibit one class of individuals from being given advantage over another group on the basis of factors such as race, resulting in an imbalance or advancement of one group over another. This is clearly what has occurred here. It obvious that the MBA filter was a "sham". Morris appointed Weaver as interim VP of Operations before he had completed his MBA degree. Morris waited for Weaver to finish his MBA degree before posting the job. Morris then added the MBA or other advanced degree requirement to the job description. After Morris, Dillihunt, and Campbell had seen who had bid on the position, they then dropped the candidate with "other advanced degree" but extensive operations experience,(the plantiff) prior to the interview process, knowing the white candidates with MBAs would be removed in the selection process because of a lack of operations experience.

The panel recognized that Mr. Weaver had been working as the interim Vice President of Operations for several months and that it was a major advantage over Mr. Nickell. This advantage resulted in his appointment to the

permanent position over Nickell. In fact the panel further stated: "Weaver was able to hit the ground running upon receiving the job permanently, and we understand why Memphis Light would find that useful." This conclusion is contrary to fact, which is that Mr. Weaver did not hit the ground running, and he was not adequately prepared to undertake the responsibilities of the position. This pre-selection process certainly filters out those whom an employer does not want, as in this case, a white male with experience and training for the position - Mr. Nickell. As described above, this pre-selection process has been a practice at MLGW for several years; by using this process they have used race as a major factor for appointments to both interim and permanent positions in the administration. It is clear that the panel used this same pre-selection criteria for their approval and sanction of the appointment of Mr. Weaver instead of Mr. Nickell.

Not many plaintiffs have direct evidence of discrimination. For those who do not, the McDonnell Douglas/Burdine analysis should be followed. But for those, including Henry Nickell, who can produce direct evidence, then the indirect analysis distorts the proof, and allows summary relief where none should be available.

III.

THE QUESTION PRESENTED IS IMPORTANT.

Congress enacted the Title VII in order to stop intentional discrimination in the workplace. This Court has broadly interpreted the Act, and its amendments, and has consistently ruled that broad relief should be granted to prevent or deter future discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-25 (1975).

To allow summary judgment based upon the indirect method, where there is direct evidence of discrimination is to thwart Congressional intent.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5076

[Filed July 30, 2001]

HENRY NICKELL, *Plaintiff-Appellant*,	)
v.	)
MEMPHIS LIGHT, GAS & WATER DIVISION, *Defendant-Appellee*.	)

On Appeal from
The United States District Court
for the Western District of Tennessee
98-02772
District Court Judge Donald

JUDGES:
Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; and QUIST, District Judge. *

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

OPINION

PER CURIAM. On December 1, 1997, Memphis Light, Gas and Water hired Alonzo Weaver, an African-American, instead of Henry Nickell as its new Vice President of Operations. Nickell sued, claiming that Memphis Light had discriminated on the basis of race in violation of Title VII. The district court awarded Memphis Light summary judgment. We AFFIRM.

We review a district court's grant of summary judgment de novo. *See Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000). Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). Inferences drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion" for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962).

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981), establish a three-step burden-shifting framework for analyzing claims of employment discrimination in Title VII cases. First, a plaintiff must set forth a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its actions. *Id.* If the defendant carries this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons offered by the

employer were a pretext for discrimination. *See Burdine*, 450 U.S. at 253. The ultimate burden of persuasion remains at all times with the plaintiff. *See id.*

This case hinges on the first step of the *McDonnell Douglas/Burdine* inquiry, whether Nickell is able to establish a prima facie case of discrimination. Because Nickell is caucasian, Weaver is African-American, and Nickell alleges reverse discrimination, success on this point requires Nickell to show two things: that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority [and] that the employer treated differently employees who were similarly situated but not members of the protected group." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994). If he cannot produce facts supporting each element of the prima facie case, then Memphis Light is indeed entitled to summary judgment. *See id.* at 801 n.7.

To demonstrate that he and Weaver were similarly situated, Nickell must "prove that *all* of the relevant aspects of his employment situation were *nearly identical* to those of [Weaver's] employment situation." *Pierce*, 40 F.3d at 802 (emphases added). These similarities must exist in all relevant aspects of their respective employment circumstances. *Id.* Furthermore, we have recently clarified that in identifying the factors to be considered in making this determination, we "should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of [the successful applicant]." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). Nickell cannot meet this threshold burden. *See Shah v. General Elec. Co.*, 816 F.2d 264, 270 (6th Cir.1987)

("Absent proof that other employees were similarly situated, it is not possible to raise an inference of discrimination.").

Memphis Light wanted to fill its vacant vice presidency from within its own ranks. To that end, its internal notice sought a candidate with the following credentials:

> A degree in Engineering or Physical Sciences and management experience in Operations, Engineering, or Construction or equivalent combination of education and experience are required. MBA or other advanced degree preferred.

Although Nickell, Weaver, and the five other applicants all satisfied the posting's basic qualifications, and Nickell and Weaver both numbered among the only four with any advanced degree whatsoever, three aspects of the record demonstrate that Nickell and Weaver were not similarly situated in their pursuit of the position.

First, Nickell had merely a master's degree in physics while Weaver had a Masters of Business Administration. When the notice for the position recited that an "MBA or other advanced degree [was] preferred," identifying the MBA by name expressed some favoritism for that particular advanced degree over others. Furthermore, besides Weaver, the other two candidates interviewed for the job had MBAs as well, as did the person being replaced. Under these circumstances, Nickell was thus less qualified. Second, it was also not material that Nickell and Weaver both happened to be managers at Memphis Light, holding concededly equivalent positions in Memphis Light's corporate organization, because

the substance of what they were responsible for managing was completely different. Weaver's department, Electric Operations, included one hundred eighty one employees and had a payroll of over seven million dollars; of the six departments reporting to the Vice President of Operations, Electric Operations was the largest in both of these categories. In contrast, Nickell's department, Supply Planning and Engineering, ranked in both a distant fifth; he oversaw a total of ten employees and a payroll of barely five hundred thousand dollars. Third, Weaver had been working as the interim Vice President of Operations for several months, giving him a major advantage against the rest of the field. Weaver was able to hit the ground running upon receiving the job permanently, and we understand why Memphis Light would find that useful.

For these reasons, Nickell cannot show that he was similarly situated to Weaver, given Memphis Light's goals in filling this post. To the extent that Nickell's resume happened to include items that Weaver's did not, most notably four more years working at Memphis Light and more overall supervisory experience, as the district court observed, "this case is a textbook example of the kind of employment decision that courts must leave to be made by employers.... Nickell had certain strengths as a candidate, and Weaver had others." We find nothing improper or invidious in the way Memphis Light tipped the balance on this particular occasion. Accordingly, Nickell does not establish a prima facie Title VII case, and summary judgment below was appropriate.

Judgment AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed January 3, 2000]

No. 98-2772 DV

HENRY NICKELL,	)
Plaintiff,	)
	)
v.	)
	)
MEMPHIS LIGHT, GAS &	)
WATER DIVISION	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court is Defendant Memphis Light, Gas & Water Division ("MLGW")'s motion for summary judgment, and its motion for partial judgment on the pleadings as to punitive damages. Plaintiff Henry Nickell ("Nickell") alleges that MGLW's decision to not promote him constituted illegal reverse racial discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). For the reasons stated herein, MLGW's motion for summary judgment is granted.

1. Background Facts

This lawsuit arises out of MLGW's filling of its vacant Vice President of Operations position. MLGW tabbed Alonzo Weaver ("Weaver"), an African-American, for the job. Plaintiff, a Caucasian man, argues that the job should have been his, and that MLGW's failure to promote him was due to racial discrimination.

Barry Novick ("Novick") was the Vice President of Operations at MLGW for approximately ten years, until his retirement on March 26, 1997. At that time, Herman Morris ("Morris") was the Interim President of MLGW. Morris decided to fill the position vacated by Novick on an interim basis by appointing an Acting Vice President of Operations. The Vice President of Operations oversaw six Departments, each of which was headed by a Manager. Nickell was the Manager of Supply Planning and Engineering, and Weaver was the Manager of Electric Operations. Morris stated in his affidavit that he was concerned with maintaining stability within MLGW Operations, and considered the following criteria in selecting a Manager to be Acting Vice President: number of employees in each Department; number of union employees within each Department; amount of payroll in each Department; and support in each Department for the current Managers, Electric Operations had approximately twice the number of employees and of union employees of the second-largest Department, and had a payroll roughly twice as large as any other. Morris stated that he appointed Weaver Acting Vice President based on these factors. Nickell's Department, Supply Planning and Engineering, was the second-smallest.

However, Nickell calls into question the need for stability in filling the Acting Vice President position. MLGW contends that stability was a high priority because of concerns about relations with the International Brotherhood of Electrical Workers, Local 1288 ("Union"), the union which represented many MLGW employees. Nickell argues that MLGW resolved its differences with the Union prior to Novick's retirement and prior to Weaver's appointment. For purposes of this motion for summary judgment, the court views the facts in the light most favorable to the Plaintiff. However, even if concerns over MLGW's relationship with the Union were not a priority, the factors Morris allegedly used in making the appointment are not unreasonable ones.

Morris next turned to the task of filling the Vice President of Operations position on a permanent basis. In multiple discussions with the Manager of Human Resources, Michael Magness ("Magness"), and the Supervisor of Selection and Placement, Delois Campbell ("Campbell"), Morris expressed his preference for a candidate with an MBA degree. The outgoing Vice President, Novick, had such a degree. Morris admitted, however, That a different advanced degree would be acceptable. On October 15, 1997, MLGW posted an internal notice soliciting applications for the position. The notice stated:

> MLGW is seeking a Vice President to manage the Operations Division so that the electric, gas and water utility systems are operated md controlled in an efficient, cost effective manner in accordance with the specifications of the Board of Commissioners and external governmental regulatory agencies. A degree in

> Engineering or Physical Sciences and management experience in Operations, Engineering or Construction or an equivalent combination of education and experience are required. MBA or other advanced degree preferred. Qualified persons interested in applying for this vacancy should submit a resume and any other pertinent information ... by 5:00 p.m. October 31, 1997.

Seven applications were submitted, including those of Nickell and Weaver. The other applicants were Leonard Phillips, Clinton Smart, Wade Stinson, and Tommy Whitlow ("Whitlow), all Caucasian males, and Rebecca Garland ("Garland"), a Caucasian female. All seven met the minimum requirements, but only four had advanced degrees. Garland, then Manager of Energy Services and Marketing, had bachelors and masters degrees in physics, and an MBA. Whitlow, then Manager of Electric Engineering, had an engineering degree and an MBA. Weaver had an engineering technology degree and an MBA. Weaver had not yet had earned his MBA when he was appointed to the interim Vice President position, but had acquired it since. Nickell had bachelors and masters degrees in physics.[1]

In filling employment vacancies, MLGW normally selected three applicants to interview. This was not a hard and fast rule, and MLGW had in the past sometimes interviewed

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[1] Nickell had worked at MLGW since November 27, 1979: Weaver had worked at MLGW since June 6, 1983. Both had taken various training courses during their tenures at MLGW.

four candidates for other job openings. In this case, however, Campbell selected three of the applicants to be interviewed by Morris. The three she selected were Garland, Whitlow, and Weaver, the three candidates with MBA degrees. According to Campbell's deposition testimony, she chose Garland because she had bachelors and masters degrees in physics and an MBA, and experience as a manager in energy management and labor relations. Whitlow was selected because of his engineering degree and MBA, and his experience in different areas of engineering and management. Weaver was chosen based on his engineering technology degree and MBA, his experience as manager of electric operations, and his experience as Acting Vice President of Operations.

Morris, who by this time had assumed the role of President of MLGW on a permanent basis, interviewed each of the three candidates. When Nickell learned that he had not been selected for an interview, he met with Morris and requested that he be considered for an interview. Morris declined to grant his request. On November 26, 1997, Weaver was offered the Vice President of Operations position, and on December 1, Weaver's appointment to the position was announced. This lawsuit followed, in which Nickell claims that Weaver, rather than he, was promoted to Vice President of Operations based on illegal racial considerations.

II. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden ofproofat trial." Celotex Corp. v. Catrett, 477 U.S. 317,322, 106 S.Ct, 2548, 91 L. Ed.2d 265 (1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. This in turn may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell Int'l, 171 F.3d 1065, 1068 (6th Cir. 1998). The court may consider any material that would be admissible or usable at trial. 10a Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Although Hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus -X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

evidence and facts must be viewed in a light most favorable to the nottmoving party, Matsushita Elec. Indus. Co. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

III. Title VII Standard

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Where the plaintiff-employee offers no direct evidence of unlawful discriminatory intent, the order and allocation of burdens of proof are as established by the evidentiary framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 392, 93 S.Ct. 1817, 36

L.Ed.2d 668 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See McDonald v. Union Camp Corp., 898 F.2d 1155, 1159 (6th Cir. 1990).

Under the McDonnell Douglas burden shifting framework, the plaintiff must first prove a prima facie ease of discrimination by a preponderance of the evidence. Wilson v. Stroh Cos., 952 F.2d 942,945 (6th Cir. 1992) (citing Burdine, 450 U.S. 252-53), If the plaintiff succeeds, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Galbraith v. N. Telecom, Inc., 944 F.2d 275,279 (6th Cir. 1991) (citing Burdine, 450 U.S. at 253), cert. denied, 503 U.S. 945, 112 S.Ct. 1497, 117 L.Ed.2d 637 (1992). Once the employer provides a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff may still prevail by establishing by a preponderance of the evidence that the employer's claimed rationale was a pretext for illegal discrimination. Wilson, 952 F.2d at 945; Mitchell v. Toledo Hosp., 964 F.2d 577, 584 (6th Cir. 1992).

In order to meet his first burden and establish a prima facie case of discrimination, the plaintiff must prove four elements:

A. that he is a member of a protected group;

B. that he was subject to an adverse employment action;

C. that he was qualified for the position sought or held; and

D. that he was replaced by a person outside the protected class.

McDonnell Douglas, 411 U.S. at 802; Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994).

In reverse discrimination cases, i.e. cases in which the plaintiff is not a member of a group historically discriminated against, a prima facie case is established upon a showing that (1) "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority," and (2) "the employer treated differently employees who were similarly situated but not members of the protected group." Pierce, 40 F.3d at 801. See also Murray v. Thistledown Racing Club, 770 F.2d 63, 67 (6th Cir. 1985).

Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Galbraith, 944 F.2d at 279 (citing Burdine, 450 U.S. at 253). "A reason is legitimate for purposes of the civil rights laws if it is nondiscriminatory, even if it is mean-spirited, ill-considered, inconsistent with humane personnel policies, or otherwise objectionable." Galbraith at 282.

If the defendant meets this burden, the plaintiff must then prove that the proffered reason for the employment decision is merely pretext. Galbraith at 279. The plaintiff may show pretext by demonstrating, by a preponderance of the evidence, either (1) that the proffered reason had no basis

may show pretext by demonstrating, by a preponderance of the evidence, either (1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the employer's action, or (3) that the proffered reason was insufficient to motivate the employer's action. Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994). The plaintiff is not required to produce direct evidence ofdiscfiminafion to rebut the employer's proffer of a legitimate, nondiscriminatory reason. Galbraith at 283. The trier of fact may ultimately look at lhe totality of the evidence to determine whether the defendant's decision was motivated by intentional discrimination. Id.

Even if the plaintiff proves that the employer's proffered reason is pretext, he still bears the ultimate burden of proving that a discriminatory intent motivated the defendant's actions. Regardless of the shifting burdens of production, the plaintiff at all times bears the "ultimate burden of persuasion." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S.Ct 2742, 125 L.Ed.2d 407 (1993) (citing Burdine, 450 U.S. at 256).

IV. Analysis

Plaintiff fails to establish even a prima facie case of reverse racial discrimination. Such a case requires showing both (1) that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority," and (2) that "the employer treated differently employees who were similarly situated but not members of the protected group." Pierce, 40 F.3d at 801. Because the court concludes that Nickell fails to satisfy the second prong of the prima facie case, it is unnecessary to

consider whether he has satisfied the first prong.

To show that they were similarly situated, Plaintiff is "required to prove that all of the relevant aspects of his employment situation were nearly identical to those of [Weaver's]." Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998) (internal quotations omitted). The Sixth Circuit has directed courts to "make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not dlemonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered similarly-situated; rather, ... the plaintiff and the employee with whom the plaintiff seeks to compare himself ... must be similar in all of the relevant circumstances." Id. (internal quotations omitted).

Plaintiff and Weaver were simply not similarly situated. As Manager, Weaver oversaw nearly 200 employees in the Electric Operations Department, while Nickell oversaw only ten employees in Supply Planning and Engineering. Weaver, but not Nickell, gained experience as the interim Vice President of Operations. Most significantly, Weaver had an MBA, and Nickell did not. These disparities constituted ways in which Plaintiff and Weaver were, racial differences aside, far from identical candidates.

Nickell's argument consists largely of ways in which he contends that he was the superior candidate. He lists a number of areas in which he had experience that Weaver lacked. He notes that he had a longer tenure with MLGW than did Weaver, and that he had more supervisory

experience. He points to his history of excellent performance evaluations. But this is not the sort of evidence that is needed to establish a prima facie case of employment discrimination. Indeed, this evidence only emphasizes that this case is a textbook example of the kind of employment decision that courts must leave to be made by employers. The two men were not similarly situated. Rather, Nickell had certain strengths as a candidate, and Weaver had others. The court cannot sit as a "super-personnel department." Letner v. Wal-Mart Discount Dept. Store, 1999 WL 68766, *5 (6th Cir.1999) (internal quotation omitted).

Plaintiff places great stock in the fact that he, like Weaver, had an advanced degree, and suggests that the fact that he was not invited to interview for the Vice President position, his advanced degree notwithstanding, is evidence of discrimination. The court fails to see the logic of this argument. It is true that the posted notice for the position stated "MBA or other advanced degree preferred," but Nickell's contention that his masters degree in physics was therefore equal to Weaver's master degree in business holds no water. MLGW does not contend that Nickell did not meet the stated qualifications for the job. Rather it contends that it preferred a candidate with an advanced business degree to one with an advanced physics degree. Defendant is completely within its rights to draw such a distinction. Nickell argues that the advanced degrees are "comparable." However, that is not Nickell's determination to make, nor this court's, but a decision thal must be left to the employer.

Nickell was not promoted to a job he wanted, and the candidate who did get the position was of a different race than Nickell. However, there were many other differences

between Nickell and Weaver, Because Plaintiff has failed to show that he was treated differently from a similarly situated employee of another race, Defendant's motion for summary judgment must be granted.

V. Conclusion

Based on all the foregoing, Defendant's motion for summary judgment on all claims is GRANTED.

IT IS SO ORDERED this 3rd day of January, 2000.

/s/_____

BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed September 10, 2001]

No. 00-5076

HENRY NICKELL, *Plaintiff-Appellant*	)
v.	)
MEMPHIS LIGHT, GAS & WATER DIVISION *Defendant-Appellee.*	)

ORDER

BEFORE: MARTIN, Chief Judge; NORRIS, Circuit Judge; and Quist,[1] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

[1] Hon. Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAY 13 2002
OFFICE OF THE CLERK

No. 01-1329

IN THE

Supreme Court of the United States

HENRY NICKELL,

Petitioner,

v.

MEMPHIS LIGHT, GAS & WATER DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit reversibly err in affirming the District Court's grant of summary judgment in favor of MLGW on the ground that Nickell did not establish a *prima facie* Title VII case.

2. Did the record contain sufficient direct evidence of discriminatory intent by the decision maker such that Nickell's case should have survived summary judgment notwithstanding the lack of a *prima facie* case based on circumstantial evidence?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Henry B. Nickell, an individual citizen of the United States, residing in the Western District of Tennessee. Henry B. Nickell was the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Memphis Light, Gas & Water Division, a division of the City of Memphis, Tennessee, is a municipal corporation. Memphis Light, Gas & Water Division was the Defendant in the District Court, and the Appellee before the Sixth Circuit Court of Appeals.

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Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case be denied.

STATEMENT OF THE CASE

As noted in the Petition, this is an action based upon Title VII in which Petitioner, Henry Nickell ("Nickell"), alleged that he was a victim of reverse discrimination because of his race (white).

Memphis Light, Gas & Water Division ("MLGW"), is a public utility as noted in the Petition. In his description of the various departments over which the Vice President of Operations (the position at issue in this case) presided, Petitioner omits the following descriptions of the departments managed by Nickell and the department managed by Alonzo Weaver ("Weaver") (the person Nickell contends was appointed to the Vice President of Operations position because of his race):

> Weaver's department, Electric Operations, included one hundred eighty one employees and had a payroll of over seven million dollars; of the six departments reporting to the Vice President of Operations, Electric Operations was the largest in both of these categories. In contrast, Nickell's department, Supply Planning and Engineering, ranked in both a distant fifth; he oversaw a total of ten employees and a payroll of barely five hundred thousand dollars.

See discussion in second from last grammatical paragraph of the Court of Appeals' July 30, 2001 decision affirming the trial court, at p. 50 of Appendix A to Petitioner's Petition.

In the fall of 1997, Petitioner, Henry Nickell, a white male employed by MLGW as Manager of Supply Planning and Utilization Engineering, along with six other MLGW employees (five white and one black) sought promotion to the Vice-President - Operations position in question. Of those applicants, three possessed MBA degrees, as did Sanford Novick, the person last employed by MLGW as Vice President Operations, on a "non-acting" basis. These three applicants, all of whom possessed MBA degrees, were referred for interview for the position; the notice for the position recited that an "MBA or other advanced degree was preferred." Nickell did not have an MBA degree but did have a Master's Degree in Physics. Of the three persons referred for interview, Weaver, a black male, who prior to assuming duties as Acting Vice-President of Operations managed MLGW's Electric Operations Department which, as noted above, had the largest number of employees and largest payroll. Weaver was selected to fill the Vice President Operations position.

Petitioner grossly misrepresents in the third grammatical paragraph of Petitioner's Statement of the Case the alleged "formal policy that guaranteed that Nickell and Garland and certain other employees, would not be excluded from consideration for bid positions solely due to requirement of an engineering degree." Nothing in such directive is relevant or otherwise pertinent to the decision-making process for selection of a Vice President of Operations. Nickell's lack of an engineering degree was not asserted by anyone as a reason Nickell was excluded from consideration for the Vice president Operations position. He was considered for the position, but was not selected for interview.

Additionally, Petitioner grossly misrepresents the circumstances and context of the vaguely described statements by Delois Campbell ("Campbell"), who, according to Petitioner, ". . . admitted that she took race into consideration in the selection process, although she admitted this was not legal" and by Curtis Dillihunt, Vice President of Human Resources of MLGW, who according to Petitioner, allegedly admitted at his deposition that at MLGW "the race of a person is considered in determining whether a candidate should be considered for a position but that it should not be so." Excerpts of Campbell's June 15, 1999 deposition and Dillihunt's June 22, 1999 deposition showing the deposition testimony in question are attached hereto as Appendix A and Appendix B respectively. Nothing in such deposition testimony is an admission or other "direct evidence" of discriminatory intent in the employment decision at issue in this case.

Ms. Campbell specifically denied that race was a consideration in the process by which Weaver was selected as one of the persons to be interviewed by the decision maker, MLGW President Herman Morris ("Morris").

Regarding Dillihunt, there is no evidence that Dillihunt was involved in any way in the selection process by which Weaver was selected as Vice President of Operations.

Furthermore, there is no evidence of any statements by Campbell, Dillihunt, Morris or anyone involved in the selection process contemporaneous with the time the selection decision was being made by Mr. Morris

Finally, Petitioner fails to point out in the Petition that during his meeting with Morris, briefly mentioned in the middle of page 4 of Petitioner's printed Brief, Petitioner asked

for an interview and that Mr. Morris declined to interview Petitioner. Such direct contact between Petitioner and Mr. Morris in connection with Mr. Morris' decision to not interview Petitioner, further marginalizes Ms. Campbell's role in the decision to not interview Petitioner.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals and District Court Did Not Err in Using the *McDonnell Douglas/Burdine Burden Shifting Analysis* in Deciding This Case.

In his Petition, Petitioner argues that the Court of Appeals erred by using the *McDonnell Douglas/Burdine Analysis* because there is direct evidence of discrimination.

In the appeal below, Plaintiff initially accepted the proposition that a *prima facie* case of reverse discrimination is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority [and] that the employer treated differently employees who were similarly situated but not members of the protected group." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994).

Rather than challenge the use of such analysis in this case, Petitioner initially argued that the District Court erred by not analyzing the "background circumstances" prong of the reverse discrimination burden shifting analysis, that Petitioner and Weaver were "similarly situated" and that issues of material fact were present as to whether Petitioner and Weaver were similarly situated.[1]

---

1. A copy of Petitioner's statement of issues, as contained in the Final Brief of Appellant filed by Petitioner in the Court of Appeals (Cont'd)

Petitioner did not raise the issue as to the applicability of the McDonnell Douglas analytical structure until filing its Petition for Reconsideration And En Banc Review. That Petition was denied in an order stating, *inter alia*, "the issues raised in the Petition were fully considered upon the original submission and decision of the case."

As discussed in the following section, the record did not contain direct evidence of discrimination. Accordingly, application of the McDonnell Douglas burden shifting analysis was appropriate.

II. The Record Does Not Contain Direct Evidence of Discriminatory Intent Sufficient to Avoid Application of the *McDonnell Douglas/Burdine Analysis*.

The alleged "direct evidence" on which Petitioner relies does not meet any definition of "direct evidence" as customarily used by the circuits. Evidence is direct evidence, excusing Plaintiff from having to use the inferential model set forth in McDonnell Douglas, only if it both speaks to the issue of discriminatory intent and relates to the specific employment decision in question. *Baron v. City of Highland Park*, 195 F.3d 333, 339 (7th Cir. 1999). *See also Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 806 (7th Cir. 1999), *cert denied*, 530 U.S. 1204, 120 S. Ct. 2197 (2000), affirming a grant of summary judgment to defendants and stating, "Direct evidence of discrimination is evidence which

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(Cont'd)
is attached hereto as Appendix C. Regarding the contention of error in finding there were no outstanding issues of material fact, at page 22 of the Final Brief of Appellant, Petitioner declared "At the very least there are genuine issues regarding how similarly situated Nickell and Weaver were."

if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *See also Schoenfield v. Babbitt*, 168 F.3d 1257, 1266-67 (11th Cir. 1998) defining direct evidence as evidence not requiring the drawing of an inference or presumption. *See also Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), rehearing *en banc denied*, 172 F.3d 884 (11th Cir. 1999), ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.")

No such "direct evidence" is present in this case.

The ultimate decision maker was Morris. There is no "direct evidence" of consideration of race by Morris in making his decision. Any conclusions as to discriminatory intent by Morris would necessarily require use of the inferential model. In this case, Petitioner is asking that inferences be made regarding Morris' intent on the basis of ambiguous statements by persons other than Morris. An "isolated and ambiguous comment . . . does not establish direct evidence of discrimination." *Hopkins v. Electronic Data Sys. Corp.*, 196 F.3d 655, 65[illegible] (6th Cir. 1999) This case does not, therefore, contain sufficient direct evidence to provide a basis for clarification of any rule of law — particularly when, as discussed below, clarification is not necessary.

III. The Question Presented is Unimportant Because This Court Has Already Clearly Held That the *McDonnell Douglas/Burdine Burden Shifting Analysis* is Inapplicable to An Employment Discrimination Case if Direct Evidence of Discrimination is Present.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 513 (1985) this Court stated:

> . . . [T]he McDonnell Douglas test is inapplicable where plaintiff presents direct evidence of discrimination.

Such was recognized by the Sixth Circuit as controlling precedent in *Burns v. City of Columbus, Department of Public Safety*, 91 F.3d 836, 843 (6th Cir. 1996). ("What is perhaps most important to note is that the Supreme Court developed the McDonnell Douglas/Burdine burden-shifting analysis for Title VII cases as an available method of proof on the element of the grantee's subjective intent where no direct evidence of discriminatory intent exists.") Such was also recognized by other circuits. *See, e.g., Fields v. Clark University*, 817 F.2d 931, 934 (1st Cir. 1987), appeal after remand 966 F.2d 49 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); *Montana v. First Federal Savings and Loan Association of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989); *Iadimarco v. Runyon*, 190 F.3d 151, 162 (3d Cir. 1999); *Spagnuolo v. Whirlpool Corporation*, 641 F.2d 1109, 1113 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 762 (5th Cir. 1996), appeal after remand 173 F.3d 254 (5th Cir. 1999), decision on rehearing *en banc* of appeal after remand 213 F.3d 209 (2000), *cert. denied*, 531 U.S. 958 (2000); *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1180 (7th Cir. 1997); *Perry v. Kunz*, 878 F.2d 1056, 1059 (8th Cir. 1989); *Douglas v. Anderson*, 656 F.2d 528 n.2 (9th Cir. 1981); *Notari v. Denver Water Department*, 971 F.2d 585, 590 (10th Cir. 1992); *Dybczak v. Tuskegee Institute*, 737 F.2d 1524, 1528 (11th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Cones v. Shalala*, 199 F.3d 512, 516 (D.C. Cir. 2000).

Accordingly, nothing would be added to jurisprudence regarding the applicability or non-applicability of a McDonell Douglas/Burdine analysis in an employment discrimination case by granting a writ of certiorari in this case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPT FROM JUNE 15, 1999 DEPOSITION OF DELOIS CAMPBELL

[Commencing at page 49]

* * *

Q. Have you ever heard anyone at MLG&W state that they were instructed to fill a position on the basis of race?

A. No. Now, some years ago when MLG&W was under a consent decree.

Q. Under affirmative action?

A. Right. Then we did. Now, in the most recent years, what management has been told was, you know, to try to have parity as much as possible. But a person would have to meet the qualifications or specifications of the job.

Q. What does parity mean; what do you mean by that?

A. Meaning that we would like our work force to represent the SMSA for our area, but, [50] in some cases, that is just not possible. Like, for example, for years we tried to get women to work in the field. We have women to work in the field, but, sometimes, it is just difficult to find some people for some jobs.

* * *

[93] * * *

Q. You had a discussion with Ms. Caldwell during her examination of you in which you referred to a desire for parity. Do you recall that discussion or using that phrase?

[94] A. Well, yes.

Q. To the best of your knowledge, did a desire for parity in any way influence your decision in selecting the people that you selected for interviewing for the position of vice president of operations?

A. No. In reaching parity, you know, if it is possible to do so, we were not under consent order or an affirmative action command or anything like that.

Now, you know, I look to see if there is a way to do so. You know, but I don't make any special — I would not reject one person for another just to see, well, I am trying to get a woman or something of that nature.

Q. So, was that desire —

A. So, it would have to be solely on qualifications. Now, it is something that management has to keep in mind. Maybe I can explain it better this way.

If I have, say, candidates and all of their qualifications are relatively equal, and let's say I have the position that is [95] nothing but men and I have an opportunity, say, to hire or promote a woman, then I would want to give her consideration, but she would have to meet the job specifications.

Q. Who told you that —

A. That is a management given.

Appendix A

Q. That is a management given, well —

A. Yes. In our, what is it, the goals that we had each year, you know, that wherever possible, but not that we were to ever, say, exclude a person or a group just to try to, say, reach a number.

Q. Did those goals in any way influence or operate as a factor in the selection of the vice president of operations?

A. No. Mr. Morris just wanted top candidates.

* * * *

APPENDIX B — EXCERPT FROM JUNE 22, 1999 DEPOSITION OF CURTIS DILLIHUNT

[Commencing at page 36]

* * *

Q. Would you agree that in the absence of a decree or order of the court, that it is illegal and inadmissible to consider the sex or race of an individual for an appointment?

A. I would think that the attorneys would have a more better expert than I am in that area. But the question that you asked, do you consider the sex or a race of a person in trying to determine should they be a subject for the position?

[37] Q. Yes, sir.

A. From a layman's standpoint, I would say yes, I agree with that.

Q. You agree that they should be considered?

A. No, should not.

* * * *

APPENDIX C — EXCERPT FROM BRIEF FOR APPELLANT

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